No. 17-1107

In The Supreme Court of the United States

MIKE CARPENTER, Interim Warden,
Oklahoma State Penitentiary,

Petitioner,

v.

PATRICK DWAYNE MURPHY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE STATES OF NEBRASKA, KANSAS, LOUISIANA, MICHIGAN, MONTANA, SOUTH DAKOTA, TEXAS, UTAH, WYOMING, AND PAUL R. LEPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the 1866 territorial boundaries of the Creek Nation within the former Indian Territory of eastern Oklahoma constitute an "Indian reservation" today under 18 U.S.C. § 1151(a).

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INTEREST OF AMICI STATES

Oklahoma's criminal jurisdiction in large swaths of the State is not all that hangs in the balance in this case. The precise boundaries of Indian lands carry a host of jurisdictional consequences for Amici States, which exercise jurisdiction on Indian lands that have long been treated as diminished or disestablished but may not satisfy the Tenth Circuit's formalistic approach to determining diminishment or disestablishment.

The Tenth Circuit's departure from this Court's common-sense totality-of-the-circumstances test for determining diminishment or disestablishment of Indian lands under *Solem v. Bartlett*, 465 U.S. 463 (1984), could upend more than a century of settled expectations of state, tribal, and federal jurisdiction in Amici States. For example, in 1854 in Kansas there were at least 14 Indian reservations, all in the most-populous eastern part of the State. Now, there are only four resident federally-recognized Indian tribes within its borders. Opening the door for the remaining tribes to exert jurisdiction within the boundaries of their former reservations because the statutes diminishing or disestablishing those reservations were unclear enough—even though the state and local governments have long exercised unquestioned jurisdiction on those lands—would be confusing and costly at best, and disastrous at worst.

Amici States' interests also extend to civil legislative, regulatory, and adjudicatory jurisdiction in

important areas such as taxation, economic development, energy, public health, and environmental regulation. Their substantial investments in these areas over the last 100 years are threatened by the Tenth Circuit's approach to determining whether Indian lands were diminished or disestablished by Congress.

Given the complex jurisdictional divide at the boundaries of Indian country, Amici States have a vital interest in the stability of those boundaries and a clear understanding of where they lie. The States likewise have an important interest in maintaining a legal test for diminishment and disestablishment that adequately considers all the circumstances surrounding an affected area. The *Solem* framework, when properly applied, is designed to accomplish that goal and yield just and correct answers to boundary dispute questions. Amici States thus have an interest in this Court reiterating that *Solem* is a holistic test, and arresting its slide into a narrow search for particular statutory words of diminishment or disestablishment.

SUMMARY OF THE ARGUMENT

Whether former Indian lands were diminished or disestablished carries enormous practical consequences in areas like eastern Oklahoma and in States where former Indian lands have been under the responsibility, care, and control of state and local governments for more than a century. Although Respondent's claim nominally lies in habeas corpus with respect to his

conviction for capital murder, the relief he seeks will eliminate over a century of Oklahoma criminal and civil jurisdiction over much of that State—precisely the type of disruptive remedy this Court has repeatedly rejected. *See, e.g.*, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215 & n.9 (2005).

I.A. Amici States are deeply concerned with the ramifications of the Tenth Circuit's application of this Court's precedents for determining whether an Indian reservation has been diminished or disestablished by Congress. The analytical framework summarized by this Court in *Solem v. Bartlett*, 465 U.S. 463 (1984), requires a holistic, all-things-considered assessment of the circumstances surrounding a possible diminishing event. It weighs not only the text of congressional enactments, but also the contemporaneous understanding of the effect of the act in question and what actually happened in the affected area afterward. The *Solem* test, applied properly, allows for diminishment even where the statutory text is ambiguous, as is often the case.

B. Placing outsized weight on the first *Solem* factor (as the Tenth Circuit did) risks collapsing *Solem* into a narrow search for particular statutory terms to find diminishment. This Court has rejected such a clear-statement rule. *Hagen v. Utah*, 510 U.S. 399, 411 (1994) ("[W]e have never required any particular form of words before finding diminishment."). Such a narrow test risks, as the United States put it at the certiorari stage, "asking the wrong question" in a diminishment analysis. U.S. Br. 6. And asking the wrong

question inevitably will lead to reaching wrong and hugely disruptive answers on critical questions of Indian country boundaries, which in turn create profound jurisdictional problems for Amici States.

C. The wisdom of this Court's adoption of a flexible and comprehensive approach to disestablishment questions is rooted in the Court's recognition that each tribe and set of Indian lands has a unique history that requires case-by-case consideration that is sensitive to that history. The Tenth Circuit's decision illustrates the catastrophic consequences of too woodenly applying the *Solem* factors in a way that downplays the importance of historical context and present-day reality.

II. Amici States have the authority and obligation to exercise civil and criminal jurisdiction over an array of activities within their borders. These include the investigation and prosecution of crimes, the collection of revenue, and the enforcement of health and environmental regulations. Amici States' ability to govern within stable and recognized geographic areas is vital to the public health and safety of the States' residents.

A State's criminal and civil jurisdiction is necessarily complicated when Indian country exists within the State's borders. Within Indian country, tribes—not States—have broad authority to govern their own members. *See New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983). And while generally "the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," this

Court has recognized exceptions to that rule. *Montana v. United States*, 450 U.S. 544, 565-66 (1981). Those exceptions provide (1) that "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements"; and (2) that a tribe may "exercise civil authority over the conduct of non-Indians on fee land within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.*

Questions about the application of the *Montana* exceptions, including whether they permit tribal court jurisdiction over tort claims against nonmembers, remain unsettled. *See, e.g.*, *Dolgencorp, Inc. v. Miss. Band of Choctaw Indians*, 746 F.3d 167 (5th Cir. 2014), *aff'd by an equally divided court sub nom. Dollar Gen. Corp. v. Miss. Band of Choctaw Indians*, 136 S. Ct. 2159 (2016). Complicating matters more is the principle that even on Indian lands over which a tribe's regulatory power would ordinarily be clear, such power may be curtailed by equitable considerations of laches and acquiescence where the tribe has declined to assert its jurisdiction over an extended period. *City of Sherrill*, 544 U.S. at 217-21.

All of this uncertainty and potential disruption cries out for the Court to reject the Tenth Circuit's application of *Solem*, which risks upsetting longstanding

expectations for reservation boundaries with drastic consequences for States.

ARGUMENT

I. *Solem* is an effective analytical framework for determining diminishment or disestablishment *only if* it remains a holistic assessment of *all* the relevant circumstances.

A. The *Solem* framework is meant to guide—but not limit—judicial inquiry on questions of diminishment and disestablishment.

In determining whether Indian lands have been diminished or disestablished, the Court applies a three-part inquiry summarized in *Solem v. Bartlett*, 465 U.S. 463 (1984). The purpose of the *Solem* framework is to determine—based on all the circumstances—whether Congress intended to diminish or disestablish Indian lands, because "only Congress can divest a reservation of its land and diminish its boundaries." 465 U.S. at 470.

As a threshold matter, Amici States note that the parties dispute not only the Tenth Circuit's application of *Solem*, but also whether *Solem* should even govern outside the surplus lands-allotment context. Pet. 29-31 ("*Solem*'s framework was not designed to analyze this situation."); Br. in Opp. 19-21. Petitioner has ably described the limited utility of *Solem* in the unique context of considering the effect of Oklahoma's statehood

on any lingering authority held by the Five Tribes. Amici States' point here is simple: to the extent that *Solem* applies to *any* diminishment or disestablishment question, it must holistically account for *all* relevant circumstances if it is to remain an effective analytical framework that does justice to the "justifiable expectations" of the residents of an affected area. *Hagen v. Utah*, 510 U.S. 399, 421 (1994).

In *Solem*, the Court distilled from its cases a three-factor framework for determining whether a particular congressional enactment caused a reservation to be diminished or disestablished. 465 U.S. at 470-72. First, "[t]he most probative evidence of diminishment is, of course, the statutory language used to open the Indian lands." *Id.* at 470. Although explicit cession or surrender-of-all-interests language "strongly suggests" congressional intent to diminish or disestablish, *id.*, the Court has rejected a "clear-statement" requirement and has "never required any particular form of words before finding diminishment," *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 471; *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 & n.4 (1977).

Second, courts must also look to "the historical context surrounding the passage" of the legislation, if it sheds light on "the contemporaneous understanding of the particular Act" at issue. *Hagen*, 510 U.S. at 411. Probative evidence may include "the manner in which the transaction was negotiated with the tribes involved and the tenor of legislative reports." *Solem*, 465 U.S. at 471. When those sources "unequivocally reveal a widely held, contemporaneous understanding that

the affected reservation would shrink as a result of the proposed legislation," diminishment may be found if the statute's language is otherwise inconclusive. *Id.* But the historical evidence need not be *literally* unequivocal; that is, the State need not show that no person ever expressed a view at odds with diminishment or disestablishment. Instead, the question is whether a common-sense review of the historical record as a whole shows a clear congressional intent to diminish or disestablish. *See, e.g., Rosebud*, 430 U.S. at 591-92, 597-98 & n.20.

Employing this approach, the Court "ha[s] been willing to infer that Congress shared the understanding that its action would diminish the reservation," even if the text of the relevant statutes would suggest otherwise. *Id.* "Even in the absence of a clear expression of congressional purpose in the text of a surplus land Act," evidence surrounding its enactment "may support the conclusion that a reservation has been diminished." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998).

Third, the Court has also examined events subsequent to the enactment in question to decipher diminishment intent. *Solem*, 465 U.S. at 471. "Congress's own treatment of the affected areas, particularly in the years immediately following the opening, has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands." *Id.*

Related to this third factor, the Court has recognized "de facto" diminishment. *Yankton Sioux*, 522 U.S. at 356 (internal quotation omitted); *Solem*, 465 U.S. at 471; *see also* Pet. 232a. The *Solem* Court held that, "[o]n a more pragmatic level," who actually moved onto opened reservation lands is an important consideration when determining diminishment or disestablishment of Indian lands. 465 U.S. at 471. Where non-Indian settlers "flooded" into an affected area "and the area has long since lost its Indian character," the Court has recognized "de facto, if not de jure, diminishment." *Yankton Sioux*, 522 U.S. at 356 (internal quotation omitted). That is because which sovereign actually assumed jurisdiction over an affected area can be "the single most salient fact" in considering an area's jurisdictional history. *Rosebud*, 430 U.S. at 603. That neither a tribe nor the federal government has sought to exercise jurisdiction over an area, "or to challenge [a] State's exercise of authority is a factor entitled to weight as part of the jurisdictional history." *Id.* at 604.

When "an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of State and local governments." *Solem*, 465 U.S. at 471 n.12. And these "'justifiable expectations'" should not be upset by strained readings of relevant congressional enactments. *City of Sherrill v. Oneida Nation of N.Y.*, 544 U.S. 197, 215 (2005) (quoting *Rosebud*, 430 U.S. at 604-05); *accord Hagen*, 510 U.S. at 421 ("jurisdictional history" and "the current population situation

. . . demonstrat[e] a practical acknowledgment" of reservation diminishment; "a contrary conclusion would seriously disrupt the justifiable expectations of the people living in the area" (internal quotation marks omitted)).

The Tenth Circuit has tended to treat the three *Solem* factors as "hierarchical," giving the second and third factors no outcome-determinative weight. *See* Pet. App. 61a; *Wyoming v. EPA*, 875 F.3d 505 (10th Cir. 2017), *cert. denied sub nom. Northern Arapaho Tribe v. Wyoming*, No. 17-1159, 2018 WL 1023014 (U.S. June 25, 2018). In effect, the Tenth Circuit has interpreted *Solem* to limit the weight given to important historical context and common sense.

But this Court has not treated the *Solem* factors this way. To the contrary, in the foundational cases establishing what would come to be known as the *Solem* framework, the Court described the factors as on equal footing. *Rosebud*, 430 U.S. at 587 ("In all cases, the face of the act, the surrounding circumstances, *and* the legislative history, are to be examined with an eye toward determining what congressional intent was." (internal quotation marks omitted; emphasis added)); *Mattz v. Arnett*, 412 U.S. 481, 505 (1973) ("A congressional determination to terminate must be expressed on the face of the Act *or* be clear from the surrounding circumstances and legislative history." (emphasis added)).

B. Placing near conclusive weight on ambiguous statutory text is anachronistic and short circuits the Court's traditional totality-of-the-circumstances approach to determining diminishment or disestablishment of Indian lands.

Flawed though the policy may have been, allotting and selling Indian reservation lands to Indians as well as non-Indian settlers through surplus land acts and the like reflected Congress's "retreat[] from the reservation concept" toward a policy of "dismantl[ing] the territories that it had previously set aside as permanent and exclusive homes for Indian tribes." *Yankton Sioux*, 522 U.S. at 335. Its intent was to "assimilate the Indians by transforming them into agrarians and opening their lands to non-Indians." *Hagen*, 510 at 425; *accord Solem*, 465 U.S. at 466-67.

Around the turn of the twentieth century, Congress shifted from pursuing its forced-assimilation-through-allotment program on a national scale. Instead it turned to dealing with surplus Indian land questions "on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467.

Against this historical backdrop, the Court has repeatedly explained the fundamental problem with focusing too narrowly on statutory text to discern diminishment or disestablishment:

> Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar," and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation."

Yankton Sioux, 522 U.S. at 343 (quoting *Solem*, 465 U.S. at 468) (citation omitted).

So in determining whether Congress intended to diminish or disestablish Indian lands, there are *no* "absolutes." *Rosebud*, 430 U.S. at 588 n.4. The "touchstone . . . is congressional purpose"—not any particular *Solem* factor. *Yankton Sioux*, 522 U.S. at 343; *accord Rosebud*, 430 U.S. at 584 ("[T]he face of the Act, the surrounding circumstances, and the legislative history, are to be examined with an eye toward determining what congressional intent was." (internal quotation marks omitted)). And while the text of relevant statutes is important in determining congressional intent, the text is but one of the factors and should not be interpreted in a way that is inconsistent with contemporary understandings or present, well-settled expectations. *See, e.g.*, *City of Sherrill*, 544 U.S.

at 202-03; *Yankton Sioux*, 522 U.S. at 343-45; *Rosebud*, 430 U.S. at 586-88 & n.4.

City of Sherrill exemplifies this Court's focus on the justifiable expectations of residents in a disputed area. There the Court emphasized the time that had passed since the Indians last owned or occupied the land, the justifiable expectations for regulatory jurisdiction, the disruptive effect on the economy, and the overall demographic character of the area in rejecting the tribe's claim that its recently purchased land was within the historical boundaries of its reservation and thus exempt from taxation. *City of Sherrill*, 544 U.S. at 202-03, 215-19.

Rosebud provides another example of this Court's holistic approach. Instead of isolating the relevant statutory language, the Court looked at the parties' historical understanding of the agreements—including a never-ratified treaty and historical context more generally—to conclude that portions of the Rosebud Reservation were disestablished. *Rosebud*, 430 U.S. at 591-92, 605-06 & n.30. The dissent in *Rosebud* was based on the same premise as the Tenth Circuit's decision—that "the absence of any express provision [of cession] in the Rosebud Acts strongly militates against [disestablishment]." *Id.* at 620 (Marshall, J., dissenting). But the majority rejected that view as "misapprehend[ing] the nature of our inquiry," which required considering the totality of the circumstances. *Id.* at 587-88 & n.4; 598 n.20.

These cases and their progeny confirm that due weight must be given to the second and third *Solem* factors. And the canon of construction that ambiguities in treaties, statutes, and contracts regarding Indian tribes should be "resolved to the benefit of Indian tribes" does not limit the weight courts give to contemporaneous historical context and post-enactment conduct and expectations. *See Yankton Sioux*, 522 U.S. at 349.

The contextual, non-statutory factors account for the fact that the quest for clear statutory language of "cession" searches statutes enacted during a time when the distinction between tribal property ownership and tribal jurisdiction had not yet been conceptualized, either by Congress or by this Court. Congress assumed that the idea of separate tribal-governed lands would be extinct in short order, so it understandably would feel no need to express that assumption in the text of statutes enacted to advance that goal. In the *Solem* line of cases, the Court assumed Congress expected tribal extinction within decades or a generation. *See* 465 U.S. at 468. But in the case of Oklahoma's Five Civilized Tribes, Congress did more than just assume future tribal extinction, it set a date certain within five years of the Creek Allotment Agreement, and could not have imagined it had preserved Indian control over the lands. *See* Pet. 10.

Limiting the influence of historical context, and thus the contemporaneous understanding of ambiguous texts, will too easily lead to a counter-historical finding of no disestablishment where disestablishment

was obvious at the time and observed in practice by all parties ever since. *Yankton Sioux*, 522 U.S. at 343-44; *see also id.* at 346 (emphasizing the importance of viewing statutes in light of the "common understanding at the time: that tribal ownership was a critical component of reservation status").

C. Each set of Indian lands has a unique and complex legal history, and the determination of whether particular lands have been diminished or disestablished must be flexible enough to account for those differences.

Exemplifying the need for a holistic and flexible test is the sheer diversity among the histories of the various Indian lands across the United States. As even a brief survey shows, the cases involving these lands each come with their own characteristics, legal history, and varying degree of clarity and specificity in their governing texts.

Since 1962, the Court has considered at least seven cases involving the classic diminishment situation—where the question is whether a reservation has been diminished by a surplus land statute opening lands for non-Indian settlement: *Nebraska v. Parker*, 136 S. Ct. 1072 (2016); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Hagen v. Utah*, 510 U.S. 399 (1994); *Solem v. Bartlett*, 465 U.S. 463 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977); *DeCoteau v. District County Courts*, 420 U.S. 425 (1975); *Mattz v.*

Arnett, 412 U.S. 481 (1973); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962).

And in each of these cases the Court has recognized the importance of the unique historical context of the statutes in question. Yes, this Court has attempted, where possible, to categorize the surplus land acts as being either a "sell and dispose" act, a "restore to the public domain" act, or an express "cession" act. *See, e.g.*, *Parker*, 136 S. Ct. at 1079-80. These labels have helped provide some consistency in how the Court treats similar surplus land acts. For example, in *Hagen* the Court said that "a statutory expression of congressional intent to diminish, coupled with the provision of a sum certain payment, . . . establish[es] a nearly conclusive presumption that the reservation had been diminished." 510 U.S. at 411. And in *Solem* the Court held that "[e]xplicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unalloted opened lands." 465 U.S. at 470. But the categorical labels the Court assigns to different types of enactments do not—and should not—alone control this Court's decisions. *Rosebud*, 430 U.S. at 598 n.20, 603.

City of Sherrill is a great example of why this Court has rejected a rigid approach to determining diminishment or disestablishment based on statutory text without context. The Oneidas had a reservation established in a treaty with the federal government, but throughout the early nineteenth century sold most of what remained of their lands to New York State and

non-Indians. *City of Sherrill*, 544 U.S. at 203, 205-07, 211. Nearly 200 years later, the Tribe repurchased some parcels on its former reservation areas (then occupied by the 99% non-Indian City of Sherrill, New York), built commercial enterprises on the parcels, and refused to pay property taxes because the parcels were Indian country and thus exempt from State taxation. *Id.* at 211-12. The Court distinguished the case from a classic reservation diminishment situation, *id.* at 215, and ultimately invoked principles of equity to "preclude the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214.

The unique history of the State of Oklahoma, which is at the heart of this case, underscores the importance of maintaining and clarifying this Court's holistic approach to tribal lands cases. The State of Oklahoma was formed in part by merger of the former Indian Territory to which the Five Tribes had been removed decades earlier. *Cohen's Handbook of Federal Indian Law* § 4.07[1] (Nell Jessup Newton et al. eds., 2012 ed.). As Petitioner has ably explained (Pet. 4-12), the reservation disestablishment arose here not from surplus land acts, but from a series of acts culminating in Oklahoma's statehood and the complete displacement of tribal authority in the newly created State. Along the way, Congress systematically "destroyed" tribal government in the region, abolishing tribal courts, "sweep[ing] away" their laws, and providing for "the final disposition" of the Five Tribes' affairs. Pet. 9-11.

In opposing certiorari, Respondent waved off this significant history, arguing simply that "[e]very State arguing for disestablishment or diminishment invokes its own unique history." Br. in Opp. 1. Putting aside the undisputable fact that a comparable statehood event is not featured in *any* of the situations described in *Solem* and its progeny, Respondent's main substantive arguments to overcome Oklahoma history cut against this Court's precedents. Respondent argues that "had Congress intended disestablishment, the textual indicators this Court has looked for were not uniquely unsuitable for Oklahoma." Br. in Opp. 1. Throughout his brief, Respondent refers to the lack of "express" or "hallmark" language of cession. Br. in Opp. 2, 24, 26. Respondent basically argues for precisely the magic-words rule this Court has rejected. *Hagen*, 510 U.S. at 411; *Solem*, 465 U.S. at 471; *Rosebud*, 430 U.S. at 588 & n.4.

But the diverse history among Indian lands, and the diverse statutory language employed by Congress in dealing with them, are precisely why this Court has rejected a clear-statement rule for diminishment or disestablishment cases. *See Hagen*, 510 U.S. at 410-11 (declining to abandon traditional "examine all the circumstances" approach in the face of variations among surplus land acts). The history summarized in this section and elsewhere in this brief punctuates the need for a holistic analytical framework that seeks to determine Congress's intent with respect to reservation status of the affected lands. In practice, that first means ensuring *Solem* step one examines *all* congressional

acts relating to an affected area in their interrelated context. Pet. 32 (The court of appeals below "missed the forest for the trees" by "parsing each statute seriatim and in isolation, thereby looking for one specific statute with specific terminology."). It also means a reaffirmation of steps two and three as equally weighted factors in the *Solem* framework. Finally, it means that no magic words dictate the outcome.

II. Turning *Solem* into a straitjacket of statutory interpretation will create widespread jurisdictional uncertainty that goes to the heart of Amici States' sovereignty.

Whether Indian lands have been diminished or disestablished historically has not been—and should not be—a search for magic words. Nor should it be treated as an abstract legal question disconnected from reality. If there is a "*practical acknowledgment* that [a] [r]eservation was diminished," *Hagen*, 510 U.S. at 421 (emphasis added), "justifiable expectations" based on the de facto settled status quo "merit heavy weight" and should not be lightly disrupted, *City of Sherrill*, 544 U.S. at 215-16. *See Rosebud*, 430 U.S. at 605 n.27 ("A showing of longstanding assumption of jurisdiction is, in the related area of state boundary disputes, entitled to considerable weight."); *Yankton Sioux*, 522 U.S. at 343-44 (emphasizing the importance of viewing statutes in light of the common understanding at the time of enactment and established present-day expectations).

Abiding by the Court's traditional, all-things-considered approach to determining whether Indian lands have been diminished or disestablished is essential to respecting settled sovereign expectations. Moving toward a more formal approach of interpreting statutes of a bygone era based on modern policy preferences (as the Tenth Circuit did), would significantly disrupt the justifiable expectations of those living within the historical boundaries of the Creek Nation reservation and would send a tsunami of uncertainty and jurisdictional litigation through Amici States. *See, e.g.*, *City of Sherrill*, 544 U.S. at 214, 216 (denying the Oneida Indian Nation the "disruptive remedy" of "rekindling the embers of sovereignty that long ago grew cold").

Although Respondent's claim to habeas relief is based on 18 U.S.C. § 1151, which "on its face [is concerned] only with criminal jurisdiction," it also "applies . . . to questions of *civil* jurisdiction." *DeCoteau v. District County Court*, 420 U.S. 425, 427 n.2 (1974) (emphasis added). And the questions of civil jurisdiction run the gamut: from taxing and zoning laws, to health and environmental regulations.[1] The scope of

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[1] Some of the Amici States have federal statutory authority to exercise criminal jurisdiction over offenses committed by or against Indians on Indian lands. *See, e.g.*, 18 U.S.C. § 1162 (P.L. 280) (conferring "jurisdiction over offenses committed by or against Indians in the areas of Indian country"); 18 U.S.C. § 3243 ("Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State."). Nebraska has "retroceded" much of this grant of

legislative or regulatory jurisdiction, in turn, sets the outer limit of tribal-court adjudicatory jurisdiction. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 330 (2008) ("[A] tribe's adjudicative jurisdiction does not exceed its legislative jurisdiction." (internal quotation marks omitted)).

The prospect of resurrecting long unrecognized reservation boundaries raises the specter of countless state, tribal, and federal jurisdictional questions that lack clear answers. *Compare, e.g., Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 201 (1985) (permitting tribal sales taxes on nonmember businesses within the reservation because the "power to tax members and non-Indians alike is . . . an essential attribute of such self-government"), *with Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 653 (2001) (seeking to reconcile several prior decisions and holding that "[a]n Indian tribe's sovereign power to tax—whatever its derivation—reaches no further than tribal land"); *see also, e.g., Negonsett v. Samuels*, 507 U.S. 99, 102 (1993)

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jurisdiction back to the federal government. It is mainly the implications for civil regulatory and adjudicatory jurisdiction that have the Amici States concerned. Indeed, even P.L. 280 offers little on this score because, as the Court held in *Bryan v. Itasca County, Minn.*, 426 U.S. 373, 383 (1976), the statute's grant of civil jurisdiction "seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes." Thus, "Public Law 280," which granted some states criminal jurisdiction over Indians within Indian country, 18 U.S.C. § 1162(a), is not a grant of "general civil regulatory authority" to the States. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207-08 (1987).

(discussing "complex patchwork" of federal, State, and tribal law governing criminal jurisdiction in Indian country); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408 (1989) (holding in splintered opinions that the tribe could limit some uses of non-Indian fee land through zoning regulations).

Indian tribes are "'distinct, independent political communities'" with residual sovereign power "to legislate and to tax activities on the reservation, including certain activities by nonmembers." *Id.* (quoting *Worcester v. Georgia*, 31 U.S. 515, 559 (1832)). This includes the "inherent sovereign power to exercise some forms of civil jurisdiction on non-Indian fee lands" within the outer boundaries of their reservations. *Montana v. United States*, 450 U.S. 544, 565-66 (1981). To be sure, tribes' legislative, regulatory, and adjudicatory authority are broadest when exercised over tribe members' activities on tribal land, and rather limited when it comes to exercising jurisdiction over nonmembers' activities within a reservation's borders, particularly when the nonmember's activity occurs on land owned in fee simple by nonmembers. *See Plains Commerce Bank*, 554 U.S. at 328 (describing the "general rule" that "restricts tribal authority over nonmember activities taking place on the reservation, [which] is particularly strong when the nonmember's activity occurs on land owned in fee simple by non-Indians"). *But see, e.g., Kerr-McGee*, 471 U.S. 195; *Brendale*, 492 U.S. at 441-44 (opinion of Stevens, J., announcing judgment in No. 87-1622, concurring in judgment as to Nos. 87-1697 and 87-1711).

But a "tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565-66. A tribe "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." *Id.*

Although the precise breadth of the *Montana* exceptions remains unsettled, Amici States take some comfort in the Court's recent cases, which emphasize that these two "exceptions" to the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe" are very "limited." *See Plains Commerce Bank*, 554 U.S. at 329-30; *Strate v. A-1 Contractors*, 520 U.S. 438, 445 (1997). But it is rather cool comfort. Tribal authority in various areas—including the authority to tax, *see, e.g.*, *Kerr-McGee*, 471 U.S. 195; *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); impose zoning restrictions, *Brendale*, 492 U.S. at 444 (opinion of Stevens, J.); and regulate natural resources, *see, e.g.*, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 337 (1983) (approving tribal licensing requirements for hunting and fishing on tribal land); *Montana*, 450 U.S. at 566 (tribe lacks authority to regulate nonmember hunting and fishing on non-Indian fee land)—have all been repeatedly litigated under the two *Montana* exceptions, yet there still seem to be more questions than answers. *Cf. Dollar Gen. Corp. v. Mississippi Band of*

Choctaw Indians, 136 S. Ct. 2159 (2016) (affirming judgment below by an equally divided court on question of scope of *Montana* exceptions in context of tort claims against nonmembers).

In some of these areas confusion and conflict will come from overlapping regulation by multiple sovereigns. *See, e.g.*, *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 186-87 (1989) (permitting duplicative state and tribal severance taxes). In others, technical questions of statutory drafting, regulatory considerations, and impact on tribal self-governance will create the jurisdictional turmoil. *See, e.g.*, *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 453 (1995) ("[A] State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.").

And this is to say nothing of tribal health and environmental regulations that could conflict with State and local regulations. *See Montana*, 450 U.S. at 565-66 (tribes "may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the *health and welfare* of the tribe" (emphasis added)). While *Plains Commerce Bank* has established a high bar for this exception's applicability, its scope in any particular situation can, and likely will, produce significant, resource-depleting litigation. 554 U.S. at 341 (citing favorably a treatise which observed "'th[e] elevated threshold for application of the second *Montana* exception suggests that tribal power must be necessary to avert catastrophic consequences'").

Applying *Solem* in a way that is less sensitive both to the reasonable expectations when Indian lands were sold more than a century ago and to settled expectations now, as Respondent no doubt will advocate, will "rekindl[e] embers of [tribal] sovereignty" and inter-sovereign jurisdictional conflict "that long ago grew cold," at great cost to Amici States and their residents who live and work on former tribal lands. *City of Sherrill*, 544 U.S. at 214.

CONCLUSION

The judgment of the court of appeals should be reversed.

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